(1) 93 2020 JUN 15 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

JOYCE PERKINS

Petitioner,

vs.

WESTERN SURETY COMPANY

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CEOLA JAMES
P.O. Box 1465
Vicksburg, MS 39180
(601) 636-2773
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether U.S. Court of Appeals for the Fifth Circuit erred in failing to vacate its judgment where same case was on appeal to the Mississippi Supreme Court, and Mississippi Supreme Court made a ruling de novo as to the award of attorney fees for Western Surety Company and other surety companies similarly situated?

(2) Whether facts of this case involves substantive rules of state law that should be followed by federal tribunal in order to avoid forum shopping?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

ARGUMENT 4

CONCLUSION 7

APPENDIX 1a

(a) MEMORANDUM OPINION AND ORDER – CHANCERY COURT 1a

(b) MEMORANDUM OPINION AND ORDER – US. DISTRICT COURT 9a

(c) ORDER – U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT AND JUDGMENT 19a

(d) ORDER – DENYING PETITION FOR REHEARING 23a

TABLE OF AUTHORITIES

Page

U.S. CODE

28 U.S.C., Section 725 2

28 U.S.C., Section 1332 2

FEDERAL RULES

Rule 60(b)(5) Federal Rules of Civil Procedure 5, 6

CASES

Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1986) 6

Erie v. Tompkins, 58 S. Ct. 817 (1938) 3, 6

Hannah v. Plumber, 85 S. Ct. 1136 (1965).....3, 6

Michigan Surety Co v. Service Machinery Corporation, 277 F. 2d 531 (5th Cir. 1960)..... 5

Perkins v. Thompson, 551 So. 2d 204 (Miss. 1989)..... 4

Perkins v. Thompson, 609 So. 2d 204 (Miss. 1992)..... 2, 4, 6

BOOKS

42 C.J.S., Indemnity, Section 20 p. 109, 110..... 6

No. _____

In The

Supreme Court of the United States

October Term, 1993

JOYCE PERKINS

Petitioner,

vs.

WESTERN SURETY COMPANY

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Petitioner, Joyce Perkins, by and through her Attorney, Ceola James, and files this her petition for a Writ of Certiorari, and Petitioner would set out the following matters in support thereof:

I.

STATEMENT OF JURISDICTION: An Order was entered in this cause on the 21st day of February, 1994. An Order denying the petition for Rehearing was entered on the 17th day of March, 1994. See the Appendix for the opinions of the Fifth Circuit Court of Appeal.

THE BASIS FOR FEDERAL JURISDICTION: Diversity jurisdiction of citizenship, 28 U.S.C., Section 1332 is asserted by the Appellant, Joyce Perkins. The parties are citizens of different states, and the matter in controversy exceeds $10,000.00

II.

CONSTITUTIONAL PROVISIONS: In federal Courts, except in matters governed by federal constitution or by acts of Congress, the laws to be applied in any case is the law of the state, 28 U.S.C., Section 725.

III.

STATEMENT OF THE CASE: This is the Appellant's second attempt to come before this Court on a Petition for a Writ of Certiorari. The first attempt was in 1992, Cause No. 91-1574, where the Appellant, Joyce Perkins attempted to suspend or nullify the ruling of the Fifth Circuit pending the ruling that was being awaited on appeal to the Mississippi Supreme Court. The Application for a Writ of Certiorari was denied.

This case involves an excessive award of attorney fees to surety company in the amount of $75,432.47 in federal court, and $39,155.65 in state court. The judgment in state court in favor of Western Surety Company has been vacated, but the federal Court has refused to vacate its judgment of $75,432.47 to comply with state law. In the case of *Perkins v. Thompson*, 609 So. 2d 390 (Miss. 1992), the Court announced a decision de novo as to surety companies. The Court held that Western Surety Company

was only entitled to be compensated for matters reasonably related to its exposure on its bond. On remand to the Chancery Court of Warren County, Western Surety was awarded $16,632.21 for fees reasonably related to its exposure on its bond. Since Western Surety Company had been ordered to pay the cost of both appeals to the Mississippi Supreme Court, along with Lizzie Lee Thompson et al., its share of the costs for the two appeals was $1,098.00. Western Surety Company received $15,534.21 as its fee for matters reasonably related to its exposure on its bond.

Appellant had tried to get the federal court not to exercise jurisdiction over the case. If the federal judgment is not vacated, Western Surety Company will be unjustly enriched by being paid $75,432.47 for two cases or appeals that it has lost trying to collect $39,155.65 which was not based on fees reasonably related to its exposure on its bond. Western Surety Company is forum shopping to avoid state law, or to avoid the decision that was on appeal to the Mississippi Supreme Court when Western Surety Company also filed for attorney fees for the two appeals in the United States District Court. This is erroneous based on *Erie v. Tompkins*, 58 S. Ct. 817 (1938) and *Hannah v. Plumber*, 85 S. Ct. 1136 (1965).

The Appellant is contending that the Fifth Circuit Court of Appeals erred on an important point of state law by not vacating its decision to comply with state law when it took jurisdiction over attorney fees in the case to award attorney fees for two appeals to the Mississippi Supreme Court, where the first appeal had been lost, and

the case was on appeal for the second time to the Mississippi Supreme Court. The second appeal to the Mississippi Supreme Court clearly announces the rule to be followed, and the ruling of the U.S. Court of Appeals for the Fifth Circuit should be vacated to comply with the ruling that was announced. The first *Perkins* case is cited as *Perkins v. Thompkins,* 551 So. 2d, 204 (Miss. 1989), but this decision was on appeal as to the attorney fees of Western Surety Company when Western Surety Company filed its petition in U.S. District Court for addition fees for its two appeals to the Mississippi Supreme Court.

The multiple litigation that has been filed by Western Surety Company has been vexatious to the Petitioner, and it has created an undue hardship for both the Petitioner and her Attorney to litigate multiple claims on the same set of facts. The Attorney for the Petitioner is a sole Practitioner.

IV.

ARGUMENT

(1) Whether U.S. Court of Appeals for the Fifth Circuit erred in failing to vacate its judgment where the same case was on appeal to the Mississippi Supreme Court, and the Mississippi Supreme Court made a ruling de novo as to the award of attorney fees for Western Surety Company and other surety companies similarly situated?

In the case of *Perkins v. Thompson,* 609 So. 2d 390, (Miss. 1992), the Mississippi Supreme Court made a ruling de novo. The case ruled that much of the fees claimed by Western Surety Company was invalid because of

"many preliminary matters, pleadings, motions, depositions, etc." which Western Surety Company admits constituted a "substantial part" of its attorney fees. The court ruled that many of these fees were not reasonably related to the exposure of the surety company on its bond. Both parties had argued the issue of reasonableness and necessity and had put on expert witnesses both in Chancery Court and in the U.S. District Court. Neither party had any way of knowing what the Mississippi Supreme Court would rule. Both parties were "fishing in the dark." Since Western Surety Company turned out to be substantially incorrect in its assessment of attorney fees, Western Surety Company should not be allowed to recover attorney fees for its appeals and costs. The complaint of Western Surety Company should therefore be vacated and dismissed.

The rule concerned with relieving a party from a judgment is announced in *Michigan Surety Company v. Service Machinery Corporation, Inc.*, 277 F. 2d 531 (5th Cir. 1960). This case held inter alia, "The rule concerning relieving a party from a final judgment is to be liberally construed and applied to carry out the purpose of avoiding . . . the enforcement of a judgment which has become erroneous even though it may have been proper when entered. Relief was promptly sought by Joyce Perkins. Rule 60(b)(5), Federal Rules of Civil Procedure also provides relief where a judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The federal judgment was based on the same contract for indemnity which was litigated in Chancery Court, and was strictly enforced so as to hold the indemnitor liable for all of the actions of the surety

company on the merits, which constituted a substantial part of the attorney fees. The participation of Western Surety Company was not held invalid until the second *Perkins* ruling, where the Mississippi Supreme Court made a ruling de novo. The ruling in the second *Perkins* appeal destroyed the right of Western Surety Company to be paid attorney fees for both appeals. Western Surety Company should not be allowed to collect attorney fees for the two appeals where it was substantially in error. A surety company should only be allowed to collect costs for appeal and court costs where indemnitor agrees and where indemnitee did not cause fees because of its own lack of due care. *Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968), 42 C.J.S., Indemnity, Section 20, p. 109, 110. Court costs were properly awarded in both *Perkins* rulings, since Western Surety Company was substantially in error. The Mandates required that costs be assessed to Western Surety Company et al. This court has the authority under Rule 60(b)(5), Federal Rules of Civil Procedure, to vacate and modify the judgment "for any other reason justifying relief from the operation of the judgment."

(2) Whether facts of this case involve substantial rules of state law that should be followed by federal tribunal in order to avoid forum shopping?

A litigant should not be allowed to make state law by forum shopping in federal court based on diversity of citizenship. *See Erie v. Thompkins*, 58 S. Ct. 817 (1938), and *Hannah v. Plumber*, 85 S. Ct. 1136 (1965). Western Surety Company is in direct violation of these two landmark decisions.

V.

CONCLUSION

The Petitioner, Joyce Perkins, is seeking to have the Judgment of the U.S. District Court of December 20, 1990, and all other Orders or Judgments relevant thereto, including the Order granting Writs of Garnishment, vacated and dismissed. Petitioner is also requesting reasonable attorney fees.

Respectfully submitted,

CEOLA JAMES
Attorney for Appellant

APPENDIX

IN THE CHANCERY COURT OF
WARREN COUNTY, MISSISSIPPI

LIZZIE LEE THOMPSON, ET AL — PLAINTIFFS

VS. — CAUSE NO. 19800

JOYCE PERKINS AND WESTERN SURETY COMPANY
DEFENDANTS

ORDER

(Filed May 28, 1993)

THIS CAUSE came on for hearing on the cross-claim of Western Surety Company against Joyce Perkins for attorney's fees and expenses, pursuant to the Opinion of the Supreme Court of the State of Mississippi in Cause Number 90-CA-0409, and the Court having heard argument of counsel and having considered memoranda of counsel with respect to the proceedings in this case, and having further considered the record heretofore made on the cross-claim, and otherwise being fully apprised in the premises finds, for the reasons set forth in this Court's Opinion of May 13, 1993, reference to which is hereby made, that reasonable charges for fees and expenses of Western Surety Company's counsel in protecting the interest and risk of Western Surety Company in this cause is the sum of $16,632.21;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Western Surety Company be and the same is hereby awarded a judgment of, from and against Joyce Perkins in the amount of $16,632.21, for which let execution issue.

SO ORDERED, ADJUDGED AND DECREED this the 28th day of May, 1993.

/s/ Gerald E. Braddock
CHANCELLOR

APPROVED AS TO FORM ONLY:

WELLS, MOORE, SIMMONS & NEELD

By: /s/ Calvin L. Wells
CALVIN L. WELLS
ATTORNEYS FOR WESTERN SURETY COMPANY

/s/ Ceola James
CEOLA JAMES
ATTORNEY FOR JOYCE PERKINS

PRESENTED BY:

CALVIN L. WELLS - 7090
WELLS, MOORE, SIMMONS & NEELD
1300 Deposit Guaranty Plaza
Post Office Box 1970
Jackson, Mississippi 39215-1970
Telephone: (601) 354-5400
Telecopier: (601) 355-5850

THE CHANCERY COURT

Ninth Chancery District Of Mississippi

May 13, 1993

G.E. Braddock
Chancellor
Post Office Box 351
Vicksburg, MS 39180
Phone: 601-638-7991

Official Court Reporters
Linda F. Burchfield
James R. Nosser
Court Administrator
Melvin R. Buckner

Ceola James, Esq.
Attorney at Law
1216 East Avenue
Vicksburg, MS 39180

Calvin L. Wells, Esq.
Attorney at Law
P. O. Box 1970
Jackson, MS 39215-1970

RE: Estate of Robert Taylor, Deceased

Lizzie Lee Thompson, et al., Western Surety Company, Plaintiffs, v. Joyce Perkins, Defendant

Cause #19800, Chancery Court of Warren County, MS.

Dear Counsel:

On August 26, 1992, the Mississippi Supreme Court vacated this Court's award of $35,000.00 of indemnity to Western Surety Company for attorneys fees and expenses, and remanded the above cause and directed such further proceedings as may be appropriate, and, in the end, order Joyce Perkins to Indemnify Western Surety Company only to the extent its interests were at risk and

fees and expenses reasonably and necessarily incurred for enforcement of the surety agreement.

This is the second time that the award by this Court of attorneys fees and expenses to Surety has been vacated and remanded. After remand in Perkins I (551 So 2d 204 (Miss. 1989)), this Court held two separate hearings and reduced attorneys fees from $39,155.65 to $35,000.00. This award was vacated in Perkins II (Sup. Ct. #90-CA-0409, August 1992) and again remanded to determine the reasonable and necessary fees and expenses incurred by Surety in protecting Surety's interests and risks to which it may be exposed under the Surety Agreement. Otherwise, to determine these fees and expenses apart from any fees and expenses included therein by Surety's counsel in involvement in the paternity issue or merits of the case.

This Court heard argument from parties' counsel on March 8, 1993, and requested and directed respective counsel to provide the Court with memorandum particularly in regard to the chronological proceedings in this case.

This case originally began with the filing on August 6, 1985, of Petition of Joyce Perkins to be appointed Administratrix of the Estate of Robert Taylor, and since has evolved into protracted litigation with two appeals to the Mississippi Supreme Court and ten volumes of pleadings and discovery. Surety did not become involved until the October 3, 1986 order of this Court joining Surety. The record reflects that as of Joyce Perkins' appointment as Administratrix there was $168,056.30 of cash assets in the estate and various parcels of real property. On November

5, 1986, the Court ordered Perkins to return and tender into the Court $168,056.30 which she had withdrawn. On November 12, 1986, Perkins paid into Court $127,100.00, leaving a balance of $40,956.30 plus accrued interest from March 16, 1986. At this time, barely over one month from the Court's order joining Surety, Surety was only at risk under its agreement for $40,956.30. This Court now feels as did the Mississippi Supreme Court that the incurring of attorneys fees and expenses of $39,155.65 to protect $40,956.30 should be scrutinized to determine the reasonable and necessary time involved by the attorneys in protecting Surety's interest against the time spent on the paternity issue.

The Court, on August 17, 1987, appointed G. Gilmore Martin as Special Master to determine the deficiency of the tender by Joyce as required by the Court's order of November 5, 1986, and to ascertain surcharge, deficiencies, or other misappropriations of the estate assets. The Special Master on August 21, 1987, submitted his report which reflected that Perkins had a beginning balance of $168,056.30, which was ordered tendered into the Court by Order of November 5, 1986, and had receipt income of $5,169.97, totalling $173,226.27. The Special Master found Perkins claimed expenditures of $46,106.46, leaving ending balance on November 4, 1986, of $127,119.81; of which $127,100 had been paid by Joyce into the registry of the Court on November 12, 1986. Of the $46,106.46 expenditures, the Special Master found Perkins should reimburse the amount of $28,626.09. The remaining $17,500.18 was found by the Special Master to be legitimate estate expenses paid.

On August 24, 1987, the Court ordered Perkins, within ten days, to pay the balance of $40,956.30 into the registry of the Court, but allowed her to deposit securities in lieu thereof.

On August 31, 1987, Perkins deposited into the registry of the Court securities of the value of $40,956.30, as required by the Court and order was entered finding Joyce had paid the balance of monies as previously ordered tendered by the Court. Upon this deposit Perkins had overpaid by $12,330.21 her obligation for monies of estate to be accounted for (except for accrued interest). Perkins therefore had properly accounted for the cash assets of the estate and Western Surety was no longer exposed to any risk and there was no necessity for Surety to incur further fees and expenses in protecting their interest. Western Surety Company, by letter of October 12, 1987, made no objections or additions to the Special Master's report and same was adopted by order of the Court on November 12, 1987. The Court there found Perkins was liable to the estate for accrued interest in the amount of $3,608.10, but was entitled to reimbursement from the estate of $12,330.21, as recommended by the Special Master, and Perkins therefore had a credit due her from the estate of $8,722.11.

Exhibit "1" to Surety's witness, Landrum's testimony is an itemized and chronological listing of Surety's attorneys fees and expenses of the litigation totalling $39,155.65. The Court considers this itemization along with the record and arguments of counsel in rendering its decision.

Counsel for Surety made charges for fees and expenses of $322.50 for services rendered prior to being joined in the litigation pursuant to Order of October 3, 1986, and these charges were not reasonable and necessary in protecting Surety's interests and risks.

From October 3, 1986, to November 12, 1986, at the time Perkins paid $127,100 of the $168,056.30, into the registry of the Court, Surety's attorneys fees and expenses totalled $4,012.56. At this time, on November 12, 1986, Surety was only at risk in the amount of $40,956.30. From November 12, 1986, to the end of Surety's attorneys billing period of September 30, 1987, Surety requested additional attorneys fees and expenses of $34,720.59 in protecting Surety's interests and risks of $40,956.30.

Protecting Surety's interests and risks was certainly not complicated and one counsel could certainly have handled and protected Surety's interests. Itemization of Surety's counsel's attorneys fees shown on Exhibit "1" reflect numerous consultations and memoranda between Surety's main attorney and associate counsel within that attorney's firm, many being reviewing other counsel's work. The Court does not feel that these charges were necessary though maybe the custom within the particular firm. They will be disallowed in the amount of $3,882.50.

Many charges were made by Surety's counsel for matters that were not undertaken to see that Perkins as Administratrix properly handled and accounted for Taylor's Estate, but dealing with the paternity issue of the cause of which Surety had no interest. These included

charges for research, consultation, attendance at depositions and hearings, and correspondence pertaining to the legitimacy statute, injunctive relief, equitable estoppel and Plaintiff Intervenor's Motion for Summary Judgment against Perkins on the paternity issue. They will be disallowed in the amount of $9,602.50.

The Court finds that the billing of Surety's counsel in the amount of $8,715.94 subsequent to August 31, 1987, after Perkins deposited the balance of securities in the amount of $40,956.30 into the registry of the Court, after which Surety was no longer at risk, was not reasonable and necessary in protecting Surety's interests and risks involved. They will not be allowed.

The court finds that the reasonable charges for fees and expenses of Surety's counsel in protecting the interests and risks of Surety in this cause is the sum of $16,632.21, and Judgment will accordingly be rendered against Joyce Perkins in favor of Surety in that amount.

Within seven days of the date of this opinion, Counsel for Surety shall prepare the appropriate order in accordance with this opinion, present same to Counsel for Perkins for approval, and then submit same to the Court.

Sincerely,

/s/ Gerald E. Braddock
GERALD E. BRADDOCK
CHANCELLOR

GEB/mrb
Enc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WESTERN SURETY COMPANY — PLAINTIFF

VS.

JOYCE PERKINS — CIVIL ACTION NO. 5:88-CV-46BC

DEFENDANT

MEMORANDUM OPINION AND ORDER
(Filed Jul. 13, 1993)

This cause is before the Court on Defendant Joyce Perkins' Motion to Vacate and Motions to Quash Garnishment. Also before the Court is the Motion of Plaintiff Western Surety Company ("Western Surety") to Dismiss and for Sanctions. Having considered the Motions and the memoranda submitted by the parties, the Court finds that the Motions of both parties are not well taken and should be denied.

I. BACKGROUND

Robert Taylor, a resident of Vicksburg, Mississippi, died intestate on August 1, 1985. Perkins, claiming that she was Taylor's illegitimate daughter and his sole heir, filed a petition in the Chancery Court of Warren County, Mississippi, to be named the administratrix of Taylor's estate. The petition and decree appointing her as administratrix was filed on August 6, 1985. Pursuant to Miss. Code Ann. § 91-7-41 (1972), Perkins posted a bond underwritten by Western Surety in the amount of $200,000. Perkins agreed in the application for bond to:

> completely indemnify the company from and against any liability, loss, cost, attorney's fees and expenses whatsoever which the company shall at any time sustain as surety or by reason of having been surety on this bond or any other bond issued for applicant, or for the enforcement of this agreement.

On March 14, 1986, the Chancery Court entered an order declaring Perkins to be Taylor's sole heir-at-law. On August 29, 1986, Lizzie Lee Thompson, Booker T. Lee, and Thelma Lee Newton, Taylor's aunts and uncle, filed a motion to intervene and to stay proceedings in the Chancery Court. On September 10, 1986, the Chancery Court rescinded the order declaring Perkins to be Taylor's heir and granted the motion of the aunts and uncle to intervene. The Chancery Court also ordered that Western Surety be named as a defendant due to its exposure under the bond.

From August 31, 1987, through September 4, 1987, the Chancery Court conducted a trial to determine whether Perkins was Taylor's natural daughter. The Chancery Court did not reach that issue but ruled in favor of the aunts and uncle because it found that Perkins had not complied with the statutory scheme for the determination of descent among illegitimates and that Perkins' claim was time barred under Miss. Code Ann. § 91-1-15(3)(c) (Supp. 1992). The attorney representing Western Surety had taken an active role in assisting Perkins' attorneys during the trial. After the trial, the Chancery Court allowed Western Surety to file a cross-claim against Perkins pursuant to the indemnification provision of the bond agreement for attorney's fees and

expenses incurred by Western Surety through September 30, 1987. On November 12, 1987, the Chancery Court entered judgment in favor of Western Surety against Perkins for $39,155.65.

On appeal, the Mississippi Supreme Court reversed the holding of the Chancery Court that Perkins' claim was time barred and vacated the award of attorney's fees as prematurely awarded. *Perkins v. Thompson*, 551 So. 2d 204, 208, 210 (Miss. 1989). The Court remanded the case to the Chancery Court to determine whether Perkins was Taylor's daughter, *id.* at 209, and invited the Chancery Court to reconsider its award of attorney's fees. *Id.* at 210. The Court directed the Chancery Court when considering the attorney's fees to determine 1) whether it was reasonably necessary for Western Surety to employ separate counsel to protect its interest, 2) whether the surety acted in good faith in incurring those expenses with its principal, and 3) whether the fees and expenses claimed were reasonable in amount. *Id.*

On remand, the Chancery Court denied Perkins' claim to the estate on the merits because it found that she failed to rebut the presumption, arising because her mother was married to another man at the time of her birth, that she was the daughter of her mother's legal husband and not of Taylor. The Chancery Court reduced the award of attorney's fees to Western Surety to $35,000.00 because it found that the unnecessary employment by Western Surety of counsel from Jackson, Mississippi, rather than from Vicksburg resulted in additional expenses of over $4,000.

On appeal, the Mississippi Supreme Court reversed the holding of the Chancery Court that Perkins had failed to rebut the presumption of legitimacy and vacated the award of attorney's fees. *In re Estate of Taylor,* 609 So. 2d 390, 398-99, 401 (Miss. 1992). The Court held that Western Surety was entitled to recover only attorney's fees and expenses incurred "by reason of having been surety on the bond," and that the Chancery Court should have limited its award by examining the legitimate interests of Western Surety and the risks to which it was exposed.[1] *Id.* at 400, 401. The Court therefore remanded the case to the Chancery Court to determine what portion of the fees were incurred by Western Surety in protecting its own interest as surety on the bond rather than in assisting Perkins on her claim to the estate, in which Western Surety had no interest. *Id.* at 401.

On April 5, 1988, after the Chancery Court made its initial award to Western Surety for attorney's fees which it incurred through September 30, 1987, but before the Mississippi Supreme Court vacated that award, Western Surety brought this action for attorney's fees and expenses incurred from October 1, 1987, through March 19, 1988, (totalling $25,557.89) and for any attorney's fees and expenses which Western Surety would incur after

---

[1] In the bond, Western Surety guaranteed only that Perkins would well and truly administer Taylor's estate, would collect and account for all assets of the estate, would pay all just debts, and would distribute the estate in accordance with the orders of the Chancery Court. The Court thus found that Western Surety had an interest in Perkins only in her official capacity as administratrix, and not in her individual capacity as a putative heir. *Id.* at 400.

March 19, 1988, as a result of Perkins' appeal of the initial ruling and award by the Chancery Court.[2] Trial was held on December 12 and 13, 1990, at which time the Chancery Court had already entered its ruling on remand, but the second appeal to the Mississippi Supreme Court was still pending.

At the outset of the trial, Perkins made an *ore tenus* motion to dismiss alleging lack of subject matter jurisdiction or, alternatively, requesting that the Court abstain due to the pending appeal to the Mississippi Supreme court. Trial Tr. at 5-6. After hearing argument from both parties, the Court denied the motion. *Id.* at 23. Perkins renewed her motion to dismiss at the conclusion of the evidence, and the Court again denied the motion. *Id.* at 351.

After denying Perkins' renewed motion to dismiss, the Court instructed the jury to find for Western Surety and to award what the jury found to be "reasonable and necessary attorney's fees and expenses incurred by Western Surety between October 1, 1987, and August 20, 1990, regarding litigation relating to the surety bond issued by Western Surety to Joyce Perkins as principal." *Id.* at 357. After deliberation, the jury returned an award of $75,032.47. On December 20, 1990, the Court entered a

---

[2] On November 29, 1988, the Court allowed Western Surety to amend its Complaint to assert a claim for attorney's fees and expenses from October 1, 1987, through October 20, 1988, (totalling $45,139.31) plus attorney's fees and expenses which Western Surety would incur from October 20, 1988, through trial as a result of Perkins' appeal to the Mississippi Supreme Court.

Final Judgment against Perkins in that amount together with interest at the rate of 7.02% from that date.

Perkins appealed to the United States Court of Appeals for the Fifth Circuit on January 2, 1991, contending that this Court did not have subject matter jurisdiction due to the action pending in the state courts. On October 1, 1991, the Fifth Circuit affirmed, holding that the pendency of the cross-claim in the state courts did not deprive this Court of subject matter jurisdiction because the two cases involved attorney's fees incurred during two different time periods. *Western Surety Co. v. Perkins*, No. 91-1025, slip op. at 2-3 (5th Cir. October 1, 1991) (per curiam). On October 13, 1991, Perkins filed a petition for rehearing, which the court denied on November 13, 1991. On February 11, 1992, Perkins filed with the United States Supreme Court a petition for writ of certiorari again alleging lack of subject matter jurisdiction. The Supreme Court denied the petition on May 18, 1992, and denied Perkins' petition for rehearing on June 29, 1992.

Perkins has now filed a motion to vacate the December 20, 1990, Judgment entered by this Court and two separate motions to quash the garnishments issued by the Court to International Business Machine Corporation and to Lea Donovan, the current administratrix of Taylor's estate, in connection with said Judgment. Western Surety has responded to the motions and has moved for sanctions against Perkins and her attorney, Ceola James, pursuant to Rule 11 of the Federal Rules of Civil Procedure.

II. PERKINS' MOTIONS

Perkins moves that the Court vacate its December 20, 1990, Judgment and quash the garnishments it issued pursuant to that Judgment. Perkins asserts that such would be proper under Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b)(5) provides in pertinent part that a party may be relieved from a judgment if "a prior judgment upon which it is based has been reversed or otherwise vacated." Perkins contends that she is entitled to relief under Rule 60(b)(5) because the second award of attorney's fees by the Chancery Court was vacated by the Mississippi Supreme Court on Perkins' second appeal to that Court, which was pending at the time this action was tried. This Court, however, did not base its Judgment on the holding of the Chancery Court. As pointed out by both this Court and the Fifth Circuit, the action in this Court and the cross-claim before the Chancery Court involved fees incurred during two different time periods, and the Court did not rely in any manner on the award of attorney's fees by the Chancery Court. Accordingly, Rule 60(b)(5) affords no relief for Perkins.

Rule 60(b)(6) authorizes relief for "any other reason justifying relief from the operation of the judgment." Perkins asserts that relief is appropriate under this provision because the Judgment would unjustly enrich Western Surety and would absorb Taylor's estate. Western Surety, however, recovered under a contractual provision to which Perkins agreed. Moreover, the jury was instructed to award only those fees which it found to be reasonable and necessary. Any arguments as to the reasonableness or necessity of the fees claimed by Western Surety thus should have been raised at trial and will not

be heard by the Court in a motion brought more than two years after the jury returned its verdict.

Perkins also renews her argument that this Court lacked subject matter jurisdiction to enter the Judgment. This argument was raised twice at trial by Perkins and was rejected each time by this Court. On appeal, the Fifth Circuit expressly held that this Court had subject matter jurisdiction. Accordingly, the Court need not consider this argument again.

At the heart of Perkins' Motions lies her argument that in its second decision the Mississippi Supreme Court held that Western Surety was allowed to recover only those fees which it incurred in protecting itself from liability under the surety agreement. *See In re Estate of Taylor*, 609 So. 2d at 400-01. Perkins contends that this Court allowed Western Surety to recover fees to which it is not entitled under that holding. In its decision, the Mississippi Supreme Court reviewed the award of attorney's fees pursuant to the provision by which Perkins promised to indemnify Western Surety for fees which it incurred "by reason of having been surety" on the bond. *Id.* The indemnification provision to which Perkins agreed, however, also provided that Perkins was to indemnify Western Surety for any fees which it incurred "for the enforcement of this agreement."

In the state court proceedings which followed the initial award of attorney's fees to Western Surety, Western Surety did not represent Perkins, nor did it defend itself from exposure under the surety bond. Instead, it simply defended the award of attorney's fees which it received pursuant to the indemnification provision of the surety

agreement. Accordingly, any fees which Western Surety incurred in the subsequent state court proceedings were incurred in an effort to enforce the surety agreement. Perkins promised to indemnify Western Surety for such fees, and the analysis for recovery under this aspect of the indemnification provision was not affected by the second decision of the Mississippi Supreme Court. Accordingly, that decision does not call into question the validity of the decision of this Court and does not warrant the relief which Perkins requests.

For these reasons, the Court will deny Perkins' motions.

III. SANCTIONS

Western Surety moves that the Court "dismiss" Perkins' motions and sanction Perkins and her attorney, Ceola James, for filing them. Rule 11 of the Federal Rules of Civil Procedure requires that every pleading, motion, or other paper submitted on behalf of a party be signed by that party's attorney. With that signature the attorney certifies:

> (1) that the attorney has conducted a reasonable inquiry into the facts which support the document;
>
> (2) that the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument "for the extension, modification, or reversal of existing law;" and

> (3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873-74 (5th Cir. 1988) (en banc) (quoting Rule 11). Should the court determine that an attorney signed a document in violation of these three affirmative duties, Rule 11 mandates that the court fashion an appropriate sanction for that attorney and/or the represented party. *Id.* at 876.

The Court finds that Perkins' motions do not warrant sanctions under Rule 11. Perkins and James made a good faith argument that the second decision of the Mississippi Supreme Court required reexamination of the previous decision of this Court. That Perkins and her attorney did not prevail under that argument does not mandate that they be sanctioned for raising it.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant Joyce Perkins' Motion to Vacate and Motions to Quash are denied.

IT IS FURTHER ORDERED that the Motion of Plaintiff Western Surety Company to Dismiss and for Sanctions is denied.

SO ORDERED this the 13th day of July, 1993.

/s/ William H. Bartour, Jr
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7546
Summary Calendar

WESTERN SURETY COMPANY,

Plaintiff-Appellee,

versus

JOYCE PERKINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-W88-0046(B))

(Filed Feb. 21, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

This court has carefully reviewed the record of the proceedings in this case and concludes that the judgment of the trial court should be AFFIRMED for the reasons

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

stated in its memorandum opinion and order filed July 13, 1993.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7546
Summary Calendar

D.C. Docket No. CA-W88-0046(B)

WESTERN SURETY COMPANY,

Plaintiff-Appellee,

versus

JOYCE PERKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi
(Filed Feb. 21, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the cost on appeal to be taxed by the Clerk of this Court.

February 21, 1994

ISSUED AS MANDATE: MAR 28 1994

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Mary Frances Vrsaljko
Deputy MAR 28 1994

New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7546

WESTERN SURETY COMPANY,

Plaintiff-Appellee,

versus

JOYCE PERKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/21/94, 5 Cir., 1994, ___ F.3d ___)

(March 18, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

REHG-8

3/17/94

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.